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Supreme Court, U.S.
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No. 09-212

In the
Supreme Court of the United States

ROBERT H. LENHAM,

Petitioner,

v.

DISABLED AMERICAN VETERANS

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals Of the State Of New Mexico

DISABLED AMERICAN VETERANS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert J. Mroz, Esq.
Madison, Harbour & Mroz, P.A.
P.O. Box 25467
Albuquerque, New Mexico 87125-5467

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QUESTION PRESENTED

Whether Petitioner Robert Lenham's Petition for Writ of Certiorari should be denied because it fails to present an issue, based on the trial record, warranting consideration by this Court.

PARTIES TO THE PROCEEDING

Petitioner Robert Lenham, Respondent Disabled American Veterans, and Interested Parties J. Edward Hollington, John L. Loeschen, Timothy L. Butler, Gary Richardson, and Richardson Law Firm, P.C. are parties to the proceeding in the court whose judgment is under review.

BASIS OF JURISDICTION

The questions raised in the Petition for Writ of Certiorari fail to raise or invoke any jurisdictional requirements required by this Court for its review.

STATEMENT OF THE CASE

This case arises from a wrongful termination lawsuit filed by Petitioner, Robert Lenham (hereafter "Petitioner"), against Respondent, Disabled American Veterans ("DAV") over thirteen years ago. While the case has been pending since 1996, over half of its duration have been devoted to issues of enforcement of a settlement agreement, the enforceability of sanctions awarded against Petitioner by the New Mexico state district court, and the enforceability of attorneys fees' liens filed by some of Petitioners' former attorneys (hereafter collectively referred to as the "enforcement phase").

This case now comes before the Court on issues arising solely from the enforcement phase of the litigation. On December 7, 2001, the New Mexico State

District Court for the First Judicial District (the "district court"), ordered enforcement of a $300,000 settlement agreement, and awarded costs and fees to DAV in the amount of $26,700.52. [*See* Petitioner's Brief, App. 4], On July 2, 2002, the district court entered a final order allowing Petitioner's first two attorneys, Gary Richardson and Timothy Butler ("Richardson and Butler") to keep a $33,884 payment made by Petitioner, denying Richardson and Butler's charging lien, and enforcing the charging lien of Petitioner's second two attorneys, John Loeschen and Edward Hollington ("Loeschen and Hollington") in the amount of $142,846.88. [*Id.*] The remaining amount was awarded to Petitioner and his new attorney, Joseph Kennedy ("Kennedy"). [*Id.*] In two consolidated appeals, Petitioner appealed the $26,700.52 award to the DAV, and Butler and Richardson appealed the district court's ruling on their charging lien. [*Id.*]

The New Mexico Court of Appeals (the "Court of Appeals") issued a memorandum opinion on April 5, 2004. [*Id.*]. The Court of Appeals vacated the district court's order, held that the order was not sufficiently supported by findings of fact and conclusions of law, and remanded the case for the district court to take further evidence, make findings and conclusions, and enter a new order. [*Id.*]. On remand, the district court took further evidence in the form of affidavit testimony from two of the attorneys, and further litigation ensued, related primarily to how the attorneys' fees would be distributed. [*See* Petitioner's Brief, App. 5]. Following the additional litigation, the district court entered a final order on August 16, 2006, recognizing that Petitioner had already been paid $130,452.60 of the $300,000 settlement, and dividing the remaining $169,547.40 between DAV

($26,700.52), Richardson and Butler ($92,850.47), and Loeschen and Hollington ($49,996.41). (*Id.*). Petitioner appealed this order.

After hearing oral arguments, the Court of Appeals filed its decision on Petitioner's Appeal on September 23, 2008, affirming the August 16, 2006 final order of the district court. [*See* Petitioner's Brief, App. 2]. The decision of the Court of Appeals was authored by Judge Lynn Pickard, with Judges Jonathan B. Sutin and Michael E. Vigil concurring. [*Id.* at App. 2 & App. 18]. With regard to the two appellate issues that pertain to DAV, the Court of Appeals first affirmed the district court's enforcement of the settlement agreement on two bases: (a) under the doctrine of law of the case, after noting that Petitioner had not raised the enforcement of settlement issue during the prior appeal; and (b) as supported by substantial evidence in the record. [*See* Petitioner's Brief, App. 8-9]. Second, the Court of Appeals affirmed the award of $26,700.52 to DAV as supported by substantial evidence in the record, under New Mexico's bad faith exception to the general rule that each party pay its own attorneys fees and costs:

> As instructed to do in our prior opinion, the court found, and supported its findings by specific record references, that Lenham had agreed to settle the case and then backed out of the agreement, necessitating additional litigation to enforce the settlement. . . . The record is rife with sworn affidavit testimony that Lenham reneged on the final settlement agreement, ultimately requiring DAV to successfully move the [district] court to enforce the agreement. Accordingly, we cannot say

> that the court abused its discretion by awarding attorney fees and costs under the bad faith exception. The evidence supports the district court's conclusion of law that "awarding the DAV its costs and fees in the amount of $26,700.52 was reasonable and justified in order for the court to vindicate its judicial authority and compensate [DAV] for the expenses incurred as a result of frivolous and vexatious litigation," and we affirm the district court on this issue.
>
> [*See* Petitioner's Brief, App.10-11]

For the reasons outlined below, the Court of Appeals' decision affirming the district court's order, including "the entire award of sanctions," [*See* Petitioner's Brief, App. 12] does not present an issue appropriate for review by the United States Supreme Court.

SUMMARY OF ARGUMENT AND REASONS FOR DENYING THE WRIT

A. The Petition for Writ of Certiorari Does Not Present An Issue Appropriate for Review By The United States Supreme Court.

Petitioner has not presented an issue that is appropriate for review by the United States Supreme Court. Rule 10 of the Rules of the Supreme Court of the United States sets forth that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and that "[a] petition for a writ of certiorari will be granted only for compelling reasons." For the reasons set forth below, no such "compelling reasons"

exist, and the Petition for Writ of Certiorari should be denied.

B. The New Mexico Court of Appeals' Substantial Evidence Review Of Rulings Made By The New Mexico State District Court, Does Not Present Issues For United States Supreme Court Review.

With regard to the issues pertaining to DAV, Petitioner is asking the United States Supreme Court to hear a case that is nothing more than the New Mexico Court of Appeals' substantial evidence review of a state trial court's findings of fact and conclusions of law on the issue of enforcement of a settlement agreement. The United States Supreme Court will consider granting certiorari in cases where (1) "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," [Sup. Ct. R. 10(a)], (2) "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United Stated court of appeals" [Sup. Ct. R. (b)], or (3) "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the United States Supreme Court], or has decided an important federal question in a way that conflicts with relevant decision of this Court" [Sup. Ct. R. 10(c)]. Of significance here is the fact that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." [Sup. Ct. R. 10].

In this case, the New Mexico Court of Appeals conducted a substantial evidence review of the enforcement of settlement issue and the award to DAV of attorneys' fees and costs. The Court of Appeals noted that an appellate court is "deferential to the facts found by the trial court," *Strata Prod. Co. v. Mercury Exploration Co.*,121 N.M. 622, 627, 916 P.2d 822, 827 (1996), [*See* Petitioner's Brief, App. 6], and if the trial court applied the law correctly, a decision will be upheld if the findings of facts are supported by substantial evidence, *Berry v. Fed. Kemper Life Assurance Co.*, 136 N.M. 454, 464, 99 P.3d 1166, 1176 (Ct. App. 2004) [*See* Petitioner's Brief , App. 6]. The Court of Appeals noted that it does "not reweigh evidence on appeal," *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 123 N.M. 329, 940 P.2d 177 (Ct. App. 1997) [*See* Petitioner's Brief, App. 7], or decide the facts of the case. *State v. Gonzales*, 126 N.M. 742, 744, 975 P.2d 355, 357 (Ct. App. 1999) [*See* Petitioner's Brief, App. 7].

Having noted these foundational principles of New Mexico law controlling appellate review, the Court of Appeals affirmed the rulings of the trial court on those issues that pertain to the DAV (enforcement of the settlement agreement, and the award of attorneys fees and costs) on the grounds that those rulings were supported by substantial evidence [*See* Petitioner's Brief, App. 8-12]. With regard to these issues, Lenham is petitioning this Court for writ of certiorari to review a substantial evidence review on these issue conducted by the New Mexico Court of Appeals. Even if erroneous, which DAV denies, a case of alleged erroneous factual findings by a state court is in the category of cases that the United States Supreme Court rarely accepts on a

Petition for Writ of Certiorari. [Sup. Ct. R. 10]. For this reason, Petitioner's Petition for Writ of Certiorari should be denied.

C. The Petitioner's Claim That The Honorable Carol Vigil Exhibited Judicial Bias Should be Rejected.

Petitioner's claim of judicial bias by The Honorable Carol Vigil should be rejected. The Court of Appeals rejected pro-se Petitioner's argument that Judge Carol Vigil exhibited bias when using phrases like "we attorneys" and "we as attorneys," by concluding that "[w]e fail to see how these statements by the judge demonstrate any bias or impartiality on her part." [*See* Petitioner's Brief, App. 17-18]. There is no reason for this Court to now revisit the issue.

D. There Is No Evidence To Support Petitioner's Claim That The Honorable Michael Vigil Exhibited Judicial Bias, And The Cases Cited By Petitioner Do Not Support A Claim of Judicial Bias Under The Facts Alleged In This Case.

The record in the instant matter is devoid of any evidence to support Petitioner's claim of judicial bias by the Honorable Michael Vigil (hereafter "Judge Vigil"). Petitioner's brief erroneously claims that Judge Vigil's refusal to recuse himself resulted in a conflict with this Court's due process precedent and that it adds to the split of authority that exists among the lower courts regarding the circumstances in which recusal is constitutionally required. [Petitioner's Brief, pp. 7, 11]. However, Petitioner makes the claim without citing to the record to demonstrate evidentiary support of his claim of judicial

bias, and fails to provide what, if anything, about his case warrants review by this Court. Instead, Petitioner's brief is essentially an essay of his thoughts on the case, along with some citations to inapplicable, factually extreme cases that he neither explains the applicability of, nor discusses in any meaningful way in his Petition to this Court. In short, Petitioner utterly fails to demonstrate that the unanimous written decision of a three-Judge panel of the New Mexico Court of Appeals, authored by the Honorable Lynn Pickard, was somehow the product of bias on the part of concurring panelist, Judge Vigil.

1. Petitioner does not identify any authority applicable to his argument that Judge Vigil's refusal to recuse himself conflicts with the Court's due process precedent.

Petitioner cites to *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009) for the premise that the facts of *Caperton* parallel the instant matter and that the "same profound ramifications for the Due Process Clause's guarantee of judicial impartiality" found in *Caperton* are also present in this case. [*See* Petitioner's Brief, p. 7]. In *Caperton*, the probability of actual bias rose to an unconstitutional level because the principal of a coal company contributed $3 million to replace an incumbent Supreme Court of Appeals Judge anticipated to be reviewing a $50 million judgment that had been entered against the coal company at the trial court level; the contribution eclipsed the total amount spent by all other supporters and exceeded by 300% the amount spent by the judge's campaign committee. *See generally, Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009). In *Caperton*, this Court stated:

> Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. *The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.*

Caperton, 129 S.Ct at 2263 (internal quotations and citations omitted) (emphasis added). Furthermore, "[t]he temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." *Id.* at. 2264. In the instant matter, neither the record nor Petitioner's brief provides any support or evidence of issues that would be analogous to those raised in *Caperton.* Petitioner's claim of judicial bias in the instant case, unsupported by the record, is not somehow bolstered by the extreme facts of *Caperton,* which in no way resemble this Petitioner's own allegations in this case. Petitioner's reliance on *Caperton* is inapplicable and misplaced.

Petitioner also cites to *In re Murchison et al.*, 349 U.S. 133, 136 (1955) for the limited quote that "a fair trial

in a fair tribunal is a basic requirement of due process" and to *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972) for the premise that a "neutral and detached judge" is an essential component of the due process requirement. [*See* Petitioner's Brief, pp. 7, 11]. Petitioner's use of these cases is limited to short quotations without any reference to the context of the respective cases, neither of which remotely resemble the instant matter.

In re Murchison involved a lack of due process caused when a "one-man grand jury" judge required witnesses to appear in secret to testify about suspected crimes and then later presided over contempt hearings with the same witnesses. *In re Murchison et al.*, 349 U.S. at 134. In *Ward*, due process was denied because the town's mayor also sat as a judge in cases of ordinance violations and traffic offenses, and a major part of the village's income was derived from the fines, forfeitures, and costs and fees imposed by the judge in his mayor's court. *Ward*, 409 U.S. at 57, 61. The Court described the situation as one in which "an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Ward*, 409 U.S. at 60 (internal quotations and citations omitted). Neither of these two cases bear resemblance to Petitioner's allegations here and his citation to them has no reasonable or logical purpose aside from using the brief phrases he takes from both.

Additionally, Petitioner cites to *Peters v. Kiff*, 407 U.S. 493, 502 (1972) for the premise that, even without actual bias, due process is denied by circumstances that

create the likelihood or appearance of bias because the possibility of judicial impropriety creates a constitutionally unacceptable risk of actual impropriety. [*See* Petitioner's Brief, p. 8]. In *Peters*, the Caucasian petitioner argued that African-Americans had systemically been excluded from the grand jury that indicted him on burglary charges. The Court held that, whatever the race, a criminal defendant has standing to challenge the system to select his grand or petit jury on the grounds that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. *See generally*, *Peters v. Kiff*, 407 U.S. 493. *Peters* is not a case of judicial bias, but one of arbitrary exclusion of juries based on race. Petitioner's reliance on it is off the mark and inapplicable to the instant matter.

Similarly, Petitioner's reliance on *Commonwealth Coating Corp. v. Continental Casualty Company*, 393 U.S. 145, 150 (1986) for the premise that Judge Vigil's refusal to recuse himself is in opposition to the Supreme Court's requirement that a judge "must avoid even the *appearance* of bias" is misplaced, and a misreading of the actual case cited. In *Commonwealth Coating Corp.*, a subcontractor filed suit against a surety to recover money owed to the contractor for a painting job. *Commonwealth Coating Corp. v. Cont'l Cas. Co.*, 393 U.S. at 146. Pursuant to an agreement, the sub appointed one arbitrator, the contractor appointed another, and the arbitrators supposedly selected a neutral third arbitrator. *Id.* It eventually came to light that the third arbitrator had actually served as an engineering consultant for the contractor on many projects and that the two had close financial dealings for a period of years, although disclosure of this information was not made until after an

award was made on behalf of the contractor. *Id.* The facts of *Commonwealth Coating Corp.* demonstrated a clear conflict of interest; in contrast, Petitioner is unable to analogize any similar conflict of interest here.[1]

Petitioner cites to *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001) in support of his argument that "[f]ederal due process requires recusal whenever a judge receives substantial campaign contributions from a party who also solicited donations from other campaign supporters." [*See* Petitioner's Brief, p. 8] Petitioner's reading of *Pierce* is in error and he does not identify or discuss the case's very narrow holding regarding campaign contributions. In *Pierce*, the attorney of a divorcing husband, along with the attorney's father, each contributed $5,000 to the campaign of a judge before whom the divorce proceedings were pending. *Pierce*, 39 P.3d at 793-4. The *Pierce* court held that a judge's impartiality might reasonably be questioned when, as in *Pierce*, a lawyer independently 1) makes a campaign contribution to that judge in the maximum amount allowed by statute, and 2) a member of that lawyer's immediate family makes a comparable maximum contribution, and 3) that lawyer further assists the judge's campaign by soliciting funds on behalf of the judge, and the contributions and solicitations occur during a pending case in which the lawyer is appearing before that judge. *Pierce*, 39 P.3d at 798. "The facts of Petitioner's case in no way mirror *Pierce*, and Petitioner does not even attempt to analogize the two. In fact, Petitioner's citation to *Pierce* is beneficial for DAV

[1] Petitioner also cites to the "National Center for State Court's directive and cites to a brief quotation from the directive, but does not provide a citation or context from where the quote was taken. [*See* Petitioner's Brief, p. 8].

because, as the *Pierce* court stated, "[s]ome courts have determined that lawyers' contributions to judicial campaigns are normal incidents to the campaigns, and the contributions do not indicate any closer relation between the contributors and the recipients than would ordinarily exist between members of the same local bar." 39 P.3d at 376. (*citing to MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1338 (Fla. 1990), *quoting, Frade v. Costa*, 342 Mass. 5, 171 N.E.2d 863, 865 (1961). Regardless, Petitioner is unable to cite to anywhere in the record where the attorneys for the DAV made any monetary contributions whatsoever to or on behalf of Judge Vigil's campaign. For this reason, and for the reasons discussed above, Petitioner's reliance on *Pierce* is in error.

Finally, Petitioner cites to an additional three cases in support of his argument that Judge Vigil's decision to not recuse himself conflicts with the Court's precedent on due process, although none of three are analogous or even remotely similar to the case at hand. Petitioner cites [*See* Petitioner's Brief, p. 9] to *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), where is was held that the Due Process Clause of the Fourteenth Amendment provided that a defendant in a criminal contempt proceeding should be given a public trial before a judge other than the one the defendant personally criticized, particularly because the two openly engaged in a bitter controversy marked by strong language from both. *See generally, Mayberry*, 400 U.S. 455.

The Court held that the trial judge should have disqualified himself because "because [n]o one so cruelly slandered is likely to maintain that calm detachment

necessary for fair adjudication." *Mayberry,* U.S. 455 at 505.

Mayberry's holding is not fitting with this case as there were no slanderous or person attacks made between Petitioner and Judge Vigil, thus making Mayberry factually and legally inapplicable.

Petitioner also cites to *Withrow v. Larkin,* 421 U.S. 35, 47 (1975) for the quote that "experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him." [*See* Petitioner's Brief, p. 9]. In *Withrow,* a physician argued that his due process rights were violated because the same members of the state board that conducted an investigation into allegations of professional misconduct were to also presiding over his suspension hearing. *Withrow,* 421 U.S. at 39-41. The Court held that the initial charge and the ultimate adjudication had different bases and purposes, and the fact that the same agency had made them in tandem did not in and of itself result in a procedural due process violation. *Id.* at 58. Thus, the *Withrow* holding found no violation of due process. *Id.* Petitioner cites to *Withrow* for the limited purpose of including a quotation he finds beneficial to his argument without properly discussing the context from where the quote was taken. [*See* Petitioner's Brief, p. 9] While this type of oversight is found throughout Petitioner's brief, it is an improper and misleading approach to presenting his argument.

Petitioner also cites, albeit briefly, to *Republican Party v. While,* 535 U.S. 765, 790 (2002) and Justice

O'Connor's concurrence wherein she states, "relying on campaign donations may leave judges feeling indebted to certain parties or interest groups." The issue in *Republican Party* was Minnesota's Judicial Code's "announce clause" and whether it violated the First Amendment. *Republican Party v. While*, 535 U.S. at 768. The Court held that the announce clause prohibited judicial election candidates from announcing their views on disputed legal and political issues. *Id.* at 788. Petitioner's citation to Justice O'Connor's quote fails to place the quote in context, namely that her concurrence is speaking to her "concerns about judicial elections generally." *Republican Party*, 535 U.S. at 789. Plaintiff relies on the portion quoted in his brief to support his contention that it is "a part of human nature for a judge to be biased *in favor* of a party whose Campaign Committee members facilitated his election to the bench" [Petitioner's Brief, p. 10], yet he provides no evidence, nor could he, to support his tacit argument that the attorneys for the DAV somehow "facilitated" Judge Vigil's election to the bench.[2]

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[2] In his first and only footnote, Petitioner cites to *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) for the quote that "[t]his Court has held that it "violates the Fourteenth Amendment . . . to subject [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in this case." [Petitioner's Brief, p. 11]. In *Tumey*, the mayor of a village had authority to sit as a judge with no jury. The mayor-judge received a salary supplement for performing judicial duties and funds for that compensation were derived from fines assessed in a case; no fines were assessed with an acquittal. Thus, the mayor-judge only received a salary supplement if he convicted the defendant. The Court held that the Due Process required disqualification because a judge cannot try a case when has a financial state in the outcome, notwithstanding the possibility that he might resist the temptation to be influenced by that interest. Petitioner likens this interest to Judge Vigil having an incentive to rule in favor of DAV because, supposedly otherwise, the attorneys for DAV would have little

2. Petitioner's citation to authority in support of his argument that Judge Vigil's refusal to recuse himself adds to the split of authority among lower courts fails to 1) define what, if any split, exists and 2) how the cited authority is applicable to the instant matter.

Petitioner states that "lower courts have reached conflicting conclusions regarding the federal constitutional standard governing recusal determinations – a conflict that extends to the campaign contribution setting implicated in this case," yet he fails to identify what the conflicting conclusions have been reached, or the jurisdictions that have contributed to the alleged split of authority. [*See* Petitioner's Brief, p. 11]. Moreover, the cases he cites to on this topic do not identify the split to which he refers to in the heading under section II of his brief. *Id.* Instead, Petitioner cites to a selection of unrelated case law and merely provides brief quotations taken out of context and without explanation as to how the merits of the respective cases support his position.

For instance, Petitioner cites to *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curium) for the quote that "[t]rial before an 'unbiased judge' is essential to due process." While this limited phrase may be an undisputed expectation of our courts, the context from which it was taken has no applicability to the instant matter. In *Johnson*, a judge was found to be so enmeshed in matters involving the defendant in a criminal matter,

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incentive to donate to any future election campaigns he may have. Petitioner's speculation on this matter is unfounded and without support.

including having been personally sued by the defendant, that the proper course of action was for the judge to have recused himself in a matter where he levied contempt charges against the defendant. See *generally*, *Johnson*, 403 U.S. 212. Here, the record is devoid of any relationship akin to the one found in *Johnson*; moreover, Petitioner does not provide how the *Johnson* ruling is related to a split in authority among any lower courts.

In support of his citation to *Johnson*, Petitioner also cites to *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) for the quote "due process requires not only that judges be fair, but that he also appears to be fair" and to *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) for the quote, "there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns." Both of these short quotes are not explained, nor is any contextual information provided as to the reasoning behind each of the respective statements. Petitioner's approach is misleading in this respect because it is necessary to put quoted words in some sort of context to appreciate their actual meaning.

In *Allen*, recusal of the judge was sought because the judge fondly referred to opposing counsel as a former law partner and by her first name, stated that "he could do anything he wanted because he was the judge," along with certain comments like, "unfortunately, sometimes you have to pay through the nose when you screw up." Allen, 139 S.W. 3d at 498-99. The Arkansas Supreme Court held that the judge's comment and rulings indicated his obvious bias. As the opinion reads, "[d]ue process requires not only that judges be fair, but that he

also appears to be fair . . . the colloquies in this case demonstrate the wisdom of the Clark rule, because when Judge Rutledge misread, at least the second motion to recuse, and repeatedly shut Allen off when Allen sought answers to his questions." *Allen*, 139 S.W.3d at 498. The judge's "remarks, along with the overall biased tone of (his) comments, indicate that he should have recused himself from the hearing." The tenor and exchange between the attorneys and judge in *Allen* are not present in our case, and Petitioner's citation to it is inapplicable. Likewise, in *Brandenburg*, the sole issue was whether a trial commissioner, who was married to an employee of the Commonwealth Attorney's office, was able to manifest the neutrality and detachment demanded of a judicial officer when presented with a warrant application for search and seizure. *See generally, Commonwealth v. Brandenburg*, 114 S.W.3d 830. The Kentucky Supreme Court held that mere association of the marital status of the commissioner to an employee of the prosecuting attorney's office created an appearance of impropriety in violation of state statute and that the trial commissioner situation might cause her to place more emphasis on the Commonwealth Attorney' opinion regarding the presence of probable cause in a warrant application because her husband was employed by that office. *Id.* at 833-6. Again, nothing in the instant case even resembles the facts found in *Brandenburg*, and the self-serving quotes Petitioner extracts from it are inapplicable and inapposite to this case.

Petitioner also cites to *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) and provides a lengthy quote from Justice Brennan's concurrence regarding impartiality being a fundamental requirement of due process.

Petitioner cites to this limited quote without explaining the case or how it applies to the current matter. *Aetna Life Ins. Co.* is one of extreme facts where an insurer refused to pay all of an insured's hospital bill and the insured filed suit in Alabama state court where he was eventually awarded a $3.5 million jury award for punitive damages. *See generally, Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813. The insurer applied for rehearing and learned that one of the five justices who had joined in the per curium majority decision had filed two actions in Alabama state court against insurers alleging bad-faith failure to pay insurance claims and seeking punitive damages. *Id.* The Court held that the justice who had independently filed separate actions against the insurer had a direct, personal, substantial, and pecuniary interest sufficient enough to establish a violation of the Due Process Clause of the Fourteenth Amendment which warranted his disqualification. *Id.* at 825. This case bears no resemblance to Petitioner's case, and his citation to it for the limited use of a quoted phrase is misleading.

Finally, Petitioner cites to two additional cases, neither of which support nor benefit his argument. The first, *State of Hawaii v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) is cited to for the limited purposes of a brief quoted phrase, namely, "due process requires that justice satisfy "satisfy the appearance of justice.' " In *Brown*, the question was whether a judge who caused a criminal contempt proceeding to be instituted could then sit with impunity in judgment of the accused. The Supreme Court of Hawaii reversed and remanded for entry of judgment of acquittal. *See generally, State of Hawaii v. Brown*, 776 P.2d 1182. Brown has no applicability to Petitioner's argument and his use of one of its quotes fails to take into

account the context of the opinion from which it was taken.

Petitioner also cites to *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1337n.4 (Fla. 1990) for the quote "there may very well come a point where a political contribution is substantial enough that it would create a well-founded fear of bias or prejudice." This quoted phrase is meaningless without explanation and Petitioner does not provide the perspective from which it was taken. In *MacKenzie*, the court concluded that a legal donation to a judge or her spouse's political campaigns, without more, is not a legally sufficient ground for disqualification. *See generally*, *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332. When Petitioner's quoted material is placed in some measure of context, it becomes clear that *MacKenzie* actually disfavors Petitioner's arguments. Petitioner does not address other pertinent issues raised in the case, such as:

> In Florida, as in Nevada, leading members of the state bar play important and active roles in guiding the public's selection of qualified jurists. Under these circumstances it would be highly anomalous if an attorney's prior participation in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal from all cases from which that attorney might be involved.

MacKenzie, 565 So.2d at 1337. (internal quotations and citations omitted).

Also, "[c]ontributions such as the one at issue are normal incidents in a campaign for public office. As long

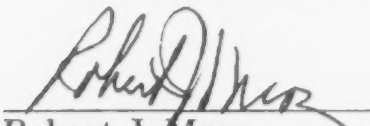
as it appears that a contribution was a normal incident in such a campaign, it does not tend to indicate any closer relationship between the contributor and the recipient than would ordinarily exist between members of the same local bar." *Id.* (internal quotations and citations omitted). Assuming for the sake of argument that Petitioner had even the slightest evidentiary support in the record for his argument that the attorneys for the DAV made even a nominal donation to Judge Vigil's campaign, the *MacKenzie* ruling would render his arguments meaningless.

CONCLUSION

As a whole, Petitioner fails to provide any authority that demonstrates that Judge Vigil's refusal to recuse himself conflicts with due process, or that it adds to a supposed split of authority among the lower courts as to when recusal is constitutionally required. Moreover, Petitioner fails to cite to anything in the record that would indicate due process was not met his case or why his case warrants review by this Court. For the reasons set forth above, Petitioner's Petition for Writ of Certiorari must be denied.

Respectfully Submitted,

MADISON, HARBOUR & MROZ, P.A



Robert J. Mroz
P.O. Box 25467
Albuquerque, NM 87125-5467
(505) 242-2177
Attorneys for Disabled American Veterans